IN THE

Supreme Court of the United States

October Term, 1971

No. 71-879

HEUBLEIN, INC.,

Appellant,

v.

SOUTH CAROLINA TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of South Carolina

REPLY BRIEF FOR THE APPELLANT

ARGUMENT

Heublein's compliance with South Carolina's Alcoholic Beverage Control Laws does not deprive it of the protection of Public Law 86-272.

Heublein agrees with the South Carolina Tax Commission that the fundamental question presented on this appeal is whether Heublein's business activities in South Carolina take it out of the protection of Public Law 86-272. This issue, however, comes before this Court considerably narrowed by the decision of the South Carolina Supreme Court.

The trial court found that Heublein's solicitation and promotional activities did not take it out of the protection of the Federal Statute [App. 33]; the Supreme Court of South Carolina left this finding undisturbed, basing its determination that Heublein was not covered by the Federal Statute on the sole ground that compliance with the ABC laws rendered its sales "intrastate" and "beyond the reach of Public Law 86-272". [App. 37]. Consequently, the only question presented to this Court is whether such compliance of itself renders Public Law 86-272 inapplicable. The nature and extent of Heublein's promotional and solicitation activities, activities which are not mandated by the state ABC laws, do not bear on this question and are not before this Court.

On the facts presented by this case, it is apparent that South Carolina's ABC laws do not require of Heublein any activities which the Federal Statute by its terms does not protect. These requirements amount to the registration of Heublein, its brands and its local agent; and having the local agent accept delivery and endorse shipping documents over to the wholesaler in South Carolina to whom the goods have been shipped. [App. 10, 18-19]. The formality of endorsement of shipping papers, constituting at most transfer of legal title within the state, is not the type of business activity which takes Heublein out of the Statute. As the legislative history makes clear, Congress sought to avoid the use of just such formalities in determining state taxing power.* It is inconceivable that Congress, dissatisfied with the results of a point-of-sale test

* S. Rep. No. 658, 86th Cong. 1st Sess. 3, 4 (1959); Brief for the Appellant, pp. 18-21.

of state taxing jurisdiction, intended to focus instead on the place where title passed.

Similarly, it is not relevant that delivery for purposes of the state ABC laws is deemed to occur in South Carolina; adherence to that test would again destroy the uniform application of the Federal Statute in each state. In the plain, ordinary meaning of the terms, orders received by Heublein from its wholesaler in South Carolina "are filled by shipment or delivery from a point outside the state"; that the admitted factual pattern also satisfies the ABC law requirement of delivery within South Carolina is irrelevant. It certainly makes no sense at all to argue, as has been done,* that South Carolina regulatory laws should be more effective in extending state taxing jurisdiction than in regulating alcoholic beverages.

A major fallacy in the reasoning of the South Carolina Supreme Court and the South Carolina Tax Commission lies in supposing that characterizations of Heublein's activities for the purposes of state ABC laws determine the applicability of the Federal Statute. Congress, on the contrary, plainly intended to establish an independent test. This independent test looks to the commercial reality of the order and shipment, in this case goods ordered from a Connecticut producer and shipped to a South Carolina wholesaler directly from an out-of-state stock of goods, despite the in-state checkpoint mandated by the state ABC laws. Because, on the facts presented, Heublein satisfies that independent test, the decision below should be reversed. More importantly, the decision below should be reversed because the South Carolina Supreme Court, as a matter of law, improperly linked the applicability of

* Memorandum for the Multistate Tax Commission as *Amicus Curiae*, p. 21.

Public Law 86-272 to characterizations of Heublein's activities derived from state law when it should have looked instead to the independent standards contained in the Federal legislation.

The unchecked application of this method of construction will have very serious consequences for Public Law 86-272, consequences by no means limited to the alcoholic beverage industry. It should be quite clear, for example, that insofar as the result reached below depends, by means of the application of South Carolina's ABC laws, upon the place where title to the goods passed or delivery occurred, the effect on Public Law 86-272 is as wide-ranging and deleterious as a return to the rejected point of sale test, *i.e.*, Public Law 86-272 is, for all practical purposes and for any article of commerce, nullified. This is so because it was the dependence of taxing jurisdiction on state determination of the place of sale that called forth Public Law 86-272, and reversion to tests dependent upon each state's determination of the point at which title passes (or delivery occurs) under local law leads to exactly the same situation which existed before Public Law 86-272.

This broad-based attack on Public Law 86-272 does not at all depend upon the nature of the goods being shipped or delivered; if it continues unchecked the effectiveness of Public Law 86-272 for all interstate commerce will be severely diminished. In the instant case, however, there is the additional element of alcoholic beverage regulation. In this case, South Carolina's ABC laws constitute the particular local law which the South Carolina Supreme Court has applied to determine that title has passed (or delivery taken place) in South Carolina with the conse-

quence, in that court's view, that South Carolina may levy its corporate income tax on Heublein. But the absence of the particular vehicle of the ABC laws in instances not involving alcoholic beverages in no way diminishes the impact of an interpretative technique which neglects the independent standards contained in the Federal Statute and persists in looking to state law. Whether local law requires that title pass within the state as a regulatory measure, or simply deem that it has so passed as a matter of local commercial law characterization makes no perceptible difference. South Carolina is in either case free, under the reasoning of the decision of its Supreme Court, to determine that full legal title to goods shipped into South Carolina passes only upon arrival in South Carolina and, as a consequence, any sales of these goods in South Carolina are "intrastate transactions and beyond the reach of Public Law 86-272."

To the argument that the Commerce Clause protects interstate commerce from this type of burden it should suffice to point out that Congress did not agree when it enacted Public Law 86-272; and, in any event, to throw interstate commerce back upon the protection of the Commerce Clause is an admission that Public Law 86-272 has been rendered totally ineffective.

The position of the South Carolina Tax Commission is only plausible if taxation is confused with regulation. The plain fact is that the South Carolina Supreme Court's failure to address itself to the Federal Statute's independent and uniform standard of protected business activity, and its resort instead to technical state law concepts of title and delivery, threatens to undermine the Federal

Statute. The notion, implicit in the Tax Commission's position, that submission to South Carolina's general corporate income tax is somehow just another regulatory burden which alcoholic beverages, by virtue of their special status under the Twenty-First Amendment, must bear and which will be limited to them is wrong and ought to be rejected. Heublein is not being regulated, it is being taxed, and the technique South Carolina has used to avoid the protective umbrella of Public Law 86-272 here can be used anywhere.

A further point must be mentioned. Alcoholic beverages are not the only articles of commerce subject to state regulation. States generally have the power to protect the health and welfare of their citizens by suitable means, and counted among the areas subject to this type of regulation would be, for example, food, prescription drugs, dangerous articles and transactions in securities typically made the subject of state Blue-Sky laws. Although, as discussed above, the reintroduction of disuniformity into state income taxation of interstate commerce need not depend upon state regulatory provisions, it is clear that use of such provisions is by no means limited to the alcoholic beverage industry and upholding their use by South Carolina to extend its taxing jurisdiction will have consequences for industries completely unconcerned with alcohol.

Where a state bases its taxing jurisdiction on compliance with its own regulatory legislation, the additional question should be asked whether this compliance results in the equivalent of shipment and delivery from outside

the state for purposes of Public Law 86-272. This does not create an exception to Public Law 86-272, but instead is an attempt to apply the Statute in accordance with its purpose, which is to achieve uniformity in taxation rather than confer upon some national industries an advantage not enjoyed by others. Where a state has, through regulation, chosen to admit certain goods into its markets only through specific channels, delivery through these channels is nonetheless, as the trial court found, "shipment or delivery" from out of state within the meaning of Public Law 86-272. [App. 34]. See *Smith, Kline & French Laboratories* v. *State Tax Comm'n,* 241 Or. 50, 430 P. 2d 375 (1965).

Congress chose not to extend the protection of Public Law 86-272 to persons whose business activities went further in exploiting the state market than the solicitation of orders specified in the Statute. Delivery of goods already ordered into South Carolina does not constitute such a further exploitation of the market: whatever additional steps Heublein takes to deliver in compliance with South Carolina's ABC laws is not a business activity designed to augment its presence within the state or enhance its marketing posture*; Heublein would have to take these same steps to deliver goods to a resident of South Carolina in response to a completely unsolicited order. Reasonable regulation will typically not require activities which expand the market of out of state firms but will instead, as here, simply channel the flow of goods in such manner as the state chooses. Delivery through these channels must be protected if the Federal Statute is to serve its purpose.

* Heublein did not perform any of these mandated activities before South Carolina enacted its ABC legislation [App. 31].

Conclusion

For the foregoing reasons, together with those contained in the Brief for the Appellant, the decision below should be reversed.

Respectfully submitted,

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